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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/074,921	02/14/2002	Kathy L. Runge		8462

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KATHY L. RUNGE
2618 IRONWOOD AVE.
MORRO BAY, CA 93442

EXAMINER

MADSEN, ROBERT A

ART UNIT PAPER NUMBER

1761

DATE MAILED: 02/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/074,921

Applicant(s)

RUNGE, KATHY L.

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-6 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

1. Applicant is advised that should claims 1,2, and 3 be found allowable, claims 4, 5 and 6 will be objected to under 37 CFR 1.75 as being a substantial duplicate thereof.

When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k). Independent claim 1 and claim 4 solely differ by the preamble where the *intended* use of claim 1 additionally provides a "flavoring enhancing" experience. Dependent claims 2 and 3 and claims 4 and 5 are respectively identical. As these are apparatus/device claims, applicant is reminded that "[w]hile features of an apparatus may be recited either structurally or functionally, claims directed to an apparatus must be distinguished from the prior art in terms of structure rather than function". (In re Schreiber, 128 F.3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997)) "[A]pparatus claims cover what a device is, not what a device does." (Hewlett-Packard Co. v. Bausch & Lomb Inc., 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990)). See MPEP 2114.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

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(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

4. Claims 1,3,4,6 are rejected under 35 U.S.C. 102(b) as being anticipated by

Schmit (US 5144880).

5. Schmit teaches an edible body (item 12 of Figure 7), which can be a ginger bread man (Figure 1), with ducting (item 76), a hole (e.g. at the upper portion below item 80) and a housing (item 70) for a flowable edible decoration (item 74), which automatically propelled from the housing when the edible body is heated. The housing is supported by a pan and the edible body is baked around the ducting, thus self-forming a channel (Column 4, line 65-.Column 6, line 34).

6.

7. Claims 1, 2,4,5 are rejected under 35 U.S.C. 102(b) as being anticipated by Moubayed (US 2766123).

8. Moubayed teaches an edible body (item 3) on platform (item 13) wherein the body has an inside portion and a hole (i.e. the portion surrounding item 10) and the platform has a hole (item 12), ducting (item 10) which extends from the upper exterior portion (e.g. in Figure 3) to the exterior underside, and a flowable substance (i.e. melted frozen confection) housing (item 14), and the ducting connects to the body's channel providing a passageway (item 16) for the melted confection. The ducting is made of plastic and the manual propelling mechanism (item 11) is operated by the users mouth.

See column 1, lines 60-65, column 2, lines 8-12, and lines 16-47 in view of Figure 3.

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9. Claims 1, 2,4,5 are rejected under 35 U.S.C. 102(e) as being anticipated by Chan (US 20030035865 A1).
10. Chan teaches a molded edible figure (item HC in Figure 20) on platform (item 22) wherein the body has an inside portion and a hole (i.e. the portion surrounding item 24) and the platform has a hole (item 37), ducting (item 24) which extends from the upper exterior portion to the exterior underside, and a flowable candy housing (item 62), and the ducting connects to the body's channel providing a passageway for the flowable candy. The ducting is made of plastic (see paragraph 0042)and the manual propelling mechanism (item 62) is operated by compression (see arrows on Figure 20). See Paragraphs 0007-0008, 0050-0053.

Claim Rejections - 35 USC § 103

11. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

12. Claims 2 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schmit (US 5144880) as applied to claims 1,3,4,6 above.
13. Schmit teaches the housing is plastic and the edible body has a self-formed channel (resulting from baking the body around the ducting), but Schmit does not expressly teach the ducting (item 76) is also plastic as recited in claims 2 and 5.

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However, Schmit in the other embodiments (e.g. Figure 6) teach that such ducting (e.g. Item 14) is plastic (Column 4 line s15-47). Therefore, it would have been obvious to modify the embodiment of Figure 7 and utilize a plastic ducting item 76 since one would have been substituting one conventional ducting for another for the same purpose: decorating a cake with a flowable substance.


Conclusion

14. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Wukowitz (US 2973871) teaches an automatic liquid fountain for cake decoration. Harris (US 6454128 B1) and Coleman (US 5324527) teach flowable edible substance dispensers.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (571) 272-1402. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.


MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700

Robert Madsen
Examiner
Art Unit 1761